

REMARKS

Applicant respectfully requests entry of this Supplemental Preliminary Amendment prior to examination of the present application. By this Supplemental Preliminary Amendment, claims 93-95 have been added. Accordingly, claims 69-65 are pending in this application. No new matter has been introduced by this Supplemental Preliminary Amendment.

In the Election/Restriction Requirement mailed June 12, 2008, the Examiner required restriction under 35 U.S.C. § 121 between two allegedly independent and distinct inventions. As stated in page 2 of the Election/Restriction, the Groups include:

Group I: Claims 69-87, “drawn to a surgical device with a sealing member having stationary accessways,” and

Group II: Claims 88-92, “drawn to a surgical device with a sealing member having movable accessways.”

The Examiner also required election under 35 U.S.C. § 121 between various allegedly patentably distinct species of the invention. As stated on page 4 of the Election/Restriction, these species include:

Species I: “defined by a sealing member with at least 2 accessways,” and

Species II: “defined by a sealing member with at least 3 accessways.”

Applicant respectfully traverses the restriction between Groups I and II. Group I is identified as “drawn to a surgical device with a sealing member having stationary accessways.” This is incorrect. The claims of Group I do not recite a sealing member “having stationary accessways.” The independent claims of Group I are generic in this

regard. Consistent with this is the addition of claims 93-95 that depend from the independent claims of Group I and recite the accessways being movable.

In view of the above, Applicant submits that the restriction between Groups I and II is improper for relying on features that are not recited in the claims. Accordingly, Applicant requests that the restriction be withdrawn.

Applicant also traverses the restriction between Species I and Species II.

M.P.E.P. Section 806.04(f) states the following:

Where two or more species are claimed, a requirement for restriction to a single species may be proper if the species are mutually exclusive. Claims to different species are mutually exclusive if one claim recites limitations disclosed for a first species but not a second, while a second claim recites limitations disclosed only for the second species and not the first. This may also be expressed by saying that to require restriction between claims limited to species, the claims must not overlap in scope.

Here, the alleged Species I and II overlap in scope, and thus the restriction between the species is improper. In particular, claims reciting a sealing member with at least 2 accessways (Species 1) overlap with claims reciting a sealing member having at least 3 accessways (Species 2). In view of this, Applicant respectfully requests that the restriction between Species I and II be withdrawn.

In view of the above, Applicant requests that all of the pending claims 69-95 be examined. To the extent that the restriction is maintained, Applicant elects Group I and Species II. Applicant submits that claims 69-95 read on Species II, with at least claims 75-79, 81, 82, and 94 being generic to both Species I and Species II.

Please grant any extensions of time required to enter this Supplemental Preliminary Amendment and Response to Restriction Requirement and charge any additional required fees to our Deposit Account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: August 12, 2008

By: 

Roland G. McAndrews
Reg. No. 41,450